IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 525

STATE OF WISCONSIN, ex rel.
JAMES R. MATTISON, *Appellee,*

vs.

ALFRED J. BAUDHUIN, *Appellant.*

MOTION TO DISMISS APPEAL AND SUPPORTING BRIEF

To LAWRENCE G. WICKERT AND
HAROLD H. FUHRMAN,
Attorneys for Appellant,
Alfred J. Baudhuin.
8742 North Green Bay Road,
Milwaukee 9, Wisconsin.

The above named appellee in the above entitled cause moves this Court to dismiss with costs the appeal taken herein to this Court by the above named appellant upon the ground that there is no substantial Federal question involved.

Dated this 6th day of December, 1955.

WALTER H. BENDER,
Attorney and Special Counsel for the Appellee.
213 West Wisconsin Avenue,
Milwaukee 3, Wisconsin.

BRIEF

I.

STATEMENT OF THE CASE

This action was commenced in the circuit court of Milwaukee County, Wisconsin, pursuant to action of the county judge of that county, taken under sec. 12.22, Wisconsin statutes. This action was taken on petition of James R. Mattison and authorized the institution in the circuit court of an action to determine whether the appellant had violated sec. 12.17, Wisconsin statutes, and whether his election to the office of chairman of the board of supervisors of the Township of Granville, Milwaukee County, Wisconsin should be declared void under the provisions of sec. 12.24, Wisconsin statutes.

This action was instituted accordingly. The appellant demurred to the complaint on the grounds that it did not state facts sufficient to constitute a cause of action and that the relief sought would infringe appellant's right to freedom of the press and deprive him of his property rights without due process of law contrary to the inhibitions of the First, Fifth and Fourteenth Amendments of the Constitution of the United States and certain provisions of the Wisconsin Constitution.

The demurrer was overruled by the circuit court of Milwaukee County, Wisconsin, and that decision was affirmed by the Wisconsin supreme court, each court holding that the appellant's charges of unconstitutionality were without foundation. (*State ex rel. Mattison vs. Baudhuin* (1955), 270 Wis. 249, 70 N.W. 2d 674.) (Appellant's Jurisdictional Statement, pages 15 to 33.) Appellant's motion for rehearing was denied by the Wisconsin supreme court without opinion (See first page,

Wisconsin Reports Advance Sheets, volume 271, number 1).

II.

The appellee objects to appellant's statement of jurisdiction heretofore filed and moves to dismiss the appeal herein on the ground that there is no substantial federal question involved.

III.

ARGUMENT

There is no substantial Federal question involved in this appeal.

The appellant apparently makes two separate claims of deprivation of rights guaranteed under the Federal Constitution, namely:

(1) That sec. 12.17, Wisconsin statutes, as interpreted and applied by the Wisconsin supreme court, violates the Federal guaranty of freedom of the press (Appellant's Jurisdictional Statement, pages 11 and 12); and

(2) That sec. 12.22(1) and (2), Wisconsin statutes, as interpreted and applied by the Wisconsin supreme court, violates the due process guaranty. (Appellant's Jurisdictional Statement, pages 12-13.)

These two challenges will be briefly and separately considered.

1. Sec. 12.17, Wisconsin statutes, as interpreted by the supreme court of Wisconsin and as applied in this case, is so clearly valid under the decisions of this court that appellant's challenge of its validity as violative of

the guaranty of free press does not present any substantial federal question.

Sec. 12.17, Wisconsin statutes, reads as follows:

> "*False statements affecting candidates.* No person, firm or corporation shall knowingly make or publish, or cause to be made or published, any false statement in relation to any candidate, which statement is intended or tends to affect any voting at any primary or election."

Before considering the decisions of this court on the question of the validity of this statute, we must have clearly in mind (a) the interpretation of sec. 12.17, Wisconsin statutes by the Wisconsin supreme court and (b) the factual situation to which it was applied by that court.

a. The interpretation of sec. 12.17, Wisconsin statutes, by the Wisconsin supreme court.

It is the settled rule that this court, in passing upon a challenge of the constitutionality of a state statute, will consider that statute with the meaning which the highest court of the state has givin to it. (*Beauharnais vs. Illinois* (1952), 343 U.S. 250, 253, 96 L. ed. 919, 925, 72 S. Ct. 725; *Chaplinsky vs. New Hampshire* (1941), 315 U.S. 568, 572, 86 L. ed. 1031, 1035-1036, 67 S. Ct. 766.)

In the case of *State ex rel. Hampel vs. Mitten* (1938), 227 Wis. 598, 607-609, 278 N.W. 431, where the Wisconsin supreme court was dealing with sec. 12.17, Wisconsin statutes, that court said:

> "* * * It is * * * possible and feasible to require of candidates that statements of fact known to be false and so substantially bearing upon the fitness of other candidates as to have a tendency to influence votes shall not be made the basis of appeals for votes. A section designed to accomplish this cannot be ac-

corded other than an important and substantial place in a chapter dealing with corrupt practices, and its deliberate violation cannot be other than a substantial and important transgression, except in instances where the subject matter of the statement is trivial or inconsequential, in which cases it doubtless would not tend to influence voters. The tendency of such false statements to affect the result of an election where they have a substantial bearing upon the fitness of candidates is obvious upon its face. The actual effect of such statements is incalculable, rendering it impossible to ascertain the will of the electors under sec. 5.01(6), Stats."

(Page 609) "It is our conclusion that sec. 12.17, Stats., was intended to be limited to statements of fact."

Sec. 5.011, Wisconsin statutes, above referred to, requires such a construction of the election statutes as will "give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to comply with some of its provisions."

Thus we see that sec. 12.17, Wisconsin statutes, as construed by the Wisconsin supreme court, requires, to constitute a violation, that the statement as to an opposing candidate be (a) false, (b) known by the maker to be false, (c) intended or naturally tending to affect voting at the election, (d) a statement of alleged fact (as opposed to mere opinion or comment), (e) not of a trivial or inconsequential character, and (f) a statement which makes it impossible to determine the real will of the electors.

The foregoing interpretation of sec. 12.17, Wisconsin statutes, in the case of *State ex rel. Hampel vs. Mitten, supra,* was directly approved, followed and applied by the Wisconsin supreme court in this case.

b. The facts in this case bring it directly within the foregoing construction of sec. 12.17, Wisconsin statutes.

The facts of this case are not in dispute for the case comes before the court on demurrer for failure to state a cause of action (Appellant's Jurisdictional Statement, page 9), which admits all well-pleaded allegations of the complaint. (*State ex rel. Pelishek vs. Washburn* (1937), 223 Wis. 595, 270 N.W. 541.) The essential facts, briefly stated, are as follows:

The appellant, during the campaign immediately preceding the April 6, 1954, election for the office of Chairman of the Town Board of Supervisors of the Town of Granville, Milwaukee County, Wisconsin, sent out to the electorate of that Town, 2500 copies of a campaign document making certain charges in reference to his opponent Evan J. Sells. (Paragraph 4 of complaint on file). Two portions of this document are challenged in this action.

The first challenged portion alleged:

> "However in the event you do not wish to accept at face value the sworn statements of Mrs. Sells regarding the failure of Mr. Sells to support his wife and children, I invite your attention to the alimony card on file in the office of the Clerk of the Circuit Court under Case No. 238-746. This card shows an arrearage in alimony and support money for his minor children on the following dates as follows:
>
> November 30, 1953.....$2,000.00
> December 22, 1953..... 2,100.00
> January 2, 1954..... 2,100.00
>
> "All these statements are taken directly from the public records of the Milwaukee County Circuit Court and may be examined by anyone. Now, I ask you, do you want a man who does not support his own little children to be the steward for the responsibilities of the Town Government? Mr. Sells has the

audacity of holding himself forward to the people of the Town as being a proper person to discharge public responsibilities. Do you not agree that this man should first put his own house in order before he attempts to conduct your Town affairs? If a person cannot meet his own personal responsibilities, how can he hope to adequately carry public responsibilities?" (Appellant's Jurisdictional Statement, pages 8-9.)

The complaint alleged and appellant's demurrer admitted that this portion of appellant's campaign document was false in that neither the alimony card nor the public records of the Milwaukee County Circuit Court showed that Evan J. Sells was in arrears in alimony and support money as alleged, and that at said dates or any of them Evan J. Sells was not in fact in arrears in alimony and support money for his minor children in the specified sums or any of them or in any substantial sum whatsoever. (Appellant's Jurisdictional Statement, page 9.)

In the same campaign document the appellant made the following additional charges as to his opponent, Evan J. Sells:

"THE REAL REASON FOR MR. SELLS' CANDIDACY. You have noticed in his public statements that Mr. Sells has advocated the *consolidation of functions* by the municipalities of Milwaukee County. As you know, this idea is the brainchild of Walter J. Mattison, the City Attorney of the City of Milwaukee. This proposal is designed to be the first phase of a gigantic program for the annexation of the Town of Granville to the City of Milwaukee. It is interesting to note that the attorney for Mr. Sells is James R. Mattison, the son of the City Attorney of the City of Milwaukee. Have you ever heard of a more clever Fifth Column movement within the Town of Granville? In the event Mr. Sells is elected as Town Chairman you can expect

> the Town of Granville to be surrendered without a fight to the City of Milwaukee (with its known exorbitant tax policy). Walter J. Mattison, as City Attorney for the City of Milwaukee, will likely 'negotiate', with his son, James R. Mattison, the attorney for Mr. Sells, and the Town of Granville will be 'sold down the river'. This interesting alliance has never been brought to the attention of the people of the Town of Granville." (Appellant's Jurisdictional Statement, pages 6-7.)

The complaint alleged and appellant's demurrer admitted that this portion of appellant's campaign document was false in that the promotion of a plan for consolidation of functions by municipalities in Milwaukee County was not the "real reason" or any reason for Evan J. Sells' candidacy, that such a proposal for consolidation was not designed by him to be the first phase of a gigantic program, or any program for the annexation of the Town of Granville to the city of Milwaukee, that Evan J. Sells never participated in any such plan, but always opposed any such annexation, and that Evan J. Sells was never part of any "Fifth Column" movement in the Town of Granville, or any other such movement in connection with annexation or any other similar plan or policy, and in fact no such movement existed. (Appellant's Jurisdictional Statement, pages 7-8.)

The complaint alleged and appellant's demurrer admitted that the campaign document allegations thus charged to be false were known by the appellant to be false when he made them, that they naturally tended to and did in fact induce many Town of Granville electors to vote against Evan J. Sells at the April 6, 1954, election and were intended by the appellant to have that effect and that, as a result, appellant was in form elected to and Evan J. Sells defeated for the office in question, and that

appellant assumed such office and has since functioned in it. (Paragraphs 6 and 7 of complaint on file herein.)

Therefore the concrete question of law, concisely stated, on this claim of unconstitutional deprivation of free press is this:

May a candidate for public office send to the electorate wilfully and knowingly false statements of fact directly tending to show his opponent unfit for such office,—statements which tended to and naturally did mislead the electors, and were intended to have that effect,—and then claim immunity from ouster from the office thus won, by asserting that the statute prohibiting the making of such statements is an unconstitutional denial of his right of free press?

c. Appellant's challenge of sec. 12.17, Wisconsin statutes, as unconstitutionally denying his right of free press does not, under the foregoing admitted facts, present a substantial federal question. This is true aside from the consideration of the "clear and present danger" rule.

Sec. 12.17, Wisconsin statutes, must, of course, be read with sec. 12.24, Wisconsin statutes, the material portion of which provides:

> "If the court shall find that the candidate whose right to any office is being investigated * * * has violated any provision of this chapter (12), in the conduct of the campaign for * * * election * * * judgment shall be entered declaring void the election of such candidate to the office for which he was a candidate, and ousting and excluding him from such office and declaring such office vacant."

This is the statutory penalty for the violation of sec. 12.17, Wisconsin statutes, and is the relief sought in this action.

Under the admitted facts, the distribution by appellant of the campaign document in question, besides being a violation of sec. 12.17, Wisconsin statutes, was the publication of a libel. Clearly it is libelous to falsely accuse a father of wilfully failing to provide support for his wife and minor children. And it is likewise libelous to assert falsely that a candidate for the office of chairman of a town board of supervisors was planning to be a party to a conspiracy to sell his town "down the river" by supporting its annexation to a large adjoining city. To appreciate fully the vicious nature and intended effect of this latter accusation, the court should consider the following extract from the decision of the circuit court in this case:

> "From the many contested annexations in Milwaukee County within recent years, the court can take, and does take, judicial notice of the feelings of a substantial number of electors in the Town of Granville against annexation of territory in the Town to the City of Milwaukee. The minds of such electors could well have been corrupted or misled against Candidate Sells by such statements, if untrue, as alleged in the complaint they were." (Page 23, Jurisdictional Statement.)

We must approach the claim of unconstitutionality of sec. 12.17, Wisconsin statutes, with several principles in mind, which have been laid down by this court.

It has been repeatedly held by this court that the right of free press is not an absolute right, but is subject to certain limitations. Since this is conceded by appellant (Appellant's Jurisdictional Statement, page 11), no authorities need be cited.

It is well settled that the right of free press does not protect the publication of libelous statements. (*Beauhar-*

nais vs. Illinois (1952), 343 U.S. 250, 256, 96 L. ed. 919, 927, 72 S. Ct. 725; *Chaplinsky vs. New Hampshire* (1941), 315 U.S. 568, 572, 86 L. ed. 1031, 1035, 67 S. Ct. 766.)

Where the prohibition of libelous language is involved, which is thus not within the area of protected speech, it is unnecessary for the court to consider the application to the situation of the "clear and present danger" rule. Thus, in *Beauharnais vs. Illinois, supra,* (343 U.S. at page 266, 96 L. ed. at page 932) this court said:

> "Libelous utterances, not being within the area of constitutionally protected speech, it is unnecessary either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.' Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class."

In fact this court has strongly intimated that, outside of the field of libel, continuing representations to the public which are unquestionably false may not be protected by the guaranty of free speech and press. (*Cafeteria Employes Union vs. Angelos* (1943), 320 U.S. 293, 295, 88 L. ed. 58, 60.) And it has also held that "a contention cannot be seriously considered which assumes that freedom of the press includes a right to raise money to promote circulation (of a magazine) by deception of the public." (*Donaldson vs. Read Magazine* (1947), 333 U. S. 178, 192, 92 L. ed. 628, 642, 68 S. Ct. 591.)

Therefore, wholly aside from any consideration of the application of the "clear and present danger" rule to the admitted factual situation which the complaint presents, it is clear that the guaranty of free press does not extend to knowingly false and libelous statements made to elec-

tors to influence, and which do actually influence their votes; and hence the appeal does not present any substantial federal question.

d. When we consider the application of the "clear and present danger" rule to the admitted facts set forth in the complaint, it is likewise very clear that the situation falls outside the pale of utterances protected by the free press guaranty.

Appellant's Jurisdictional Statement (page 2) cites four decisions of this court as the basis for his claim that his appeal presents a substantial federal question. They are *Schenck vs. U. S.* (1919), 249 U.S. 47, 63 L. ed. 470; *Herndon vs. Lowry* (1937), 301 U.S. 242, 81 L. ed. 1066; *Bridges vs. California* (1941), 314 U.S. 252, 86 L. ed. 192; *Mullane vs. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 94 L. ed. 865.

Apparently the first three of these cases are cited in connection with appellant's claim of denial of the right of free speech and press and the fourth in connection with his contention that he is denied property rights,—i.e. the emoluments pertaining to the office of chairman of the board of supervisors of the Town of Granville, Milwaukee County, Wisconsin, without due process of law.

The first three of the above cases involve statements of the "clear and present danger" rule and its application to specific situations before this court where unconstitutional invasions of the right of free speech and press were charged. Since no one of such cases presents any factual analogy to the instant case, they need not be discussed in any detail here.

It remains to consider briefly, then, on this first challenge, the admitted facts set forth in the complaint in connection with sec. 12.17, Wisconsin statutes, and the

decision of the Wisconsin court appealed from, and to show that the situation involved was plainly one within the "clear and present danger" rule justifying and in fact requiring the decision in question.

We are not dealing here with a criminal statute punishing its violation with fine or imprisonment. While sec. 12.17, Wisconsin statutes, prohibits the making in reference to any candidate of knowingly false statements which tend or are intended to affect voting at any election, the only penalty which is visited upon the wrongdoer is ouster from the office which he gained by the prohibited method.

It is obviously true, as the Wisconsin supreme court said in the case of *State ex rel. Hampel vs. Mitten* (1938), 227 Wis. 598, 607, 278 N.W. 431:

> "Nothing is more important in a democracy than the accurate recording of the untrammeled will of the electorate. Gravest danger to the state is present when this will does not find proper expression due to the fact that the electors are corrupted or are misled. * * * The tendency of such false statements to affect the result of the election where they have a substantial bearing upon the fitness of candidates is obvious upon its face. The actual effect of such statements is incalculable, rendering it impossible to ascertain the will of the electors. * * * ."

The Wisconsin supreme court in the decision in this case cited the *Hampel* decision with approval.

Here, then, we have a "clear * * * danger." The admitted facts in the complaint, as the Wisconsin supreme court held, presented a situation clearly within sec. 12.17, Wisconsin statutes.

In the first portion of the libelous campaign document the appellant falsely charged that the records of the Milwaukee County Circuit Court showed that his oppos-

ing candidate was in arrears in his alimony and support of his minor children in sums of over $2,000.00 and then asks,—

> " * * * do you want a man who does not support his own little children to be the steward for the responsibilities of the Town Government?"

In the second portion of the libelous campaign document the appellant falsely charged that the "real reason" for his opponent's candidacy was that he had become party to a nefarious conspiracy whereby, if he was elected as town chairman, he would surrender the town of Granville to the city of Milwaukee "without a fight" and the town would be " 'sold down the river' " to Milwaukee.

The articles are cleverly phrased, but the test is how they would naturally be understood by the electors to whom the pamphlets were sent. It is difficult to conceive of a set of false accusations more likely to be politically fatal to the chances of a candidate for public office, by deceiving the electorate, than these statements.

The appellant not only admits that these statements were false, but also admits that he knew when he made them that they were false, that they actually induced many of the electors to vote against candidate Sells and were intended to have that effect.

Here, then, we have an actual illustration of the "clear * * * danger" referred to in the "clear and present danger" rule. It was a nefarious plan that concededly actually misled the town electors and prevented the election from registering the true will of the electorate.

Obviously, it was also a "present danger." The document was sent out on April 3, 1954,— three days before the election, when there was no time to prepare and mail

an adequate pamphlet in reply. It resulted in the issuance of the certificate of office to one not entitled to it. It has enabled appellant through his service of his demurrer and his successive appeals first to the Wisconsin supreme court and then to this court to consume most of the term of office, which is only two years, and expires in April, 1956. (Sec. 60.19(1), Wisconsin statutes.) On the expiration of that term he will doubtless contend that this ouster action has become moot.

This court pointed out in the case of *American Communications Association vs. Douds* (1949), 339 U.S. 382, 394, 94 L. ed. 925, 941, 70 S. Ct. 674, referring to the guaranty of free speech and press that "those freedoms themselves are dependent upon the power of constitutional government to survive." (339 U.S. at page 394.) And this court added: "If it is to survive, it must have the power to protect itself against unlawful conduct * * *." (id.) And this court quoted with approval (339 U.S. at page 399) from its decision in *Cox vs. New Hampshire* (1941), 312 U.S. 569, 574, 85 L. ed. 1049, 1052, 61 S. Ct. 762, 133 A.L.R. 1396, as follows:

> "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."

Our systems of government, state and national, are bottomed upon the choice of public servants by the process of the ballot. Our democratic system depends very largely upon the purity of our elections. If the state cannot protect the integrity and purity of the ballot against such acts as the appellant admits he committed, by declaring void the election in which they were used and ousting the guilty party from the office which he has in form won by

their use, then the survival of our government and of the very freedoms which the appellant seeks to invoke are indeed in grave peril. The duty of the state to protect the purity of its elections clearly outweighs any interest of the appellant under the free press guaranty.

2. It is so clear that sec. 12.22, Wisconsin statutes, and the accompanying sections 12.23 and 12.24, which prescribe the procedure for instituting and conducting an ouster action for violation of sec. 12.17, Wisconsin statutes, as interpreted and applied by the Wisconsin supreme court, do not deprive appellant of property without due process of law, that appellant's challenge on this ground presents no substantial federal question.

Appellant's contention on this point seems to run as follows:

He was in form elected to the office of chairman of the board of supervisors of the Town of Granville, Milwaukee County, Wisconsin. That office carried certain emoluments, in and to which his election gave him a vested property right. Since sec. 12.22, Wisconsin statutes, permitted an *ex parte* application to the county judge of Milwaukee County and upon proper showing a decision by the county judge authorizing the commencement of this ouster action, and the appointment of special counsel to conduct the same, appellant was deprived of his emoluments of office without due process of law. (For the convenience of the court sections 12.22, 12.23 and 12.24, Wisconsin statutes, are printed in full as an Appendix to this brief.)

This contention is plainly without foundation in law for several reasons.

a. The appellant is not in a position to invoke the due process guaranty because, under the facts set forth in the complaint and admitted by the demurrer, he never came into legal possession of the office of chairman of the board of supervisors of his town. His admitted violation of sec. 12.17, Wisconsin statutes, resulted in rendering the April, 1954, election completely void so far as the office in question was concerned. Hence appellant never acquired any title to that office and nothing in Chapter 12, Wisconsin statutes, can be said to deprive him of that right or of any emoluments connected therewith.

Here again this court will follow the construction which the supreme court of Wisconsin has given to the pertinent sections of Chapter 12, Wisconsin statutes. (*Supra, page 4.*)

The Wisconsin supreme court, in the case of *State ex rel. La Follette vs. Kohler* (1930), 200 Wis. 518, 552, 228 N.W. 895, 69 A.L.R. 34, had before it the following language of sec. 12.24(1), Wisconsin statutes:

> "If the court shall find that the candidate whose right to office is being investigated * * * has violated any provision of this chapter, in the conduct of the campaign for * * * election, * * * judgment shall be entered declaring void the election of such candidate for the office for which he was a candidate, and ousting and excluding him from such office and declaring the office vacant."

Referring to this language the Wisconsin supreme court said (200 Wis. at page 552):

> "There would seem to be little doubt that the clear legislative purpose was to declare that a violation of the act by a candidate should render his election void. It is difficult to read anything else out of it. If the

> election is void and the candidate has intruded into the office, it is clear that he had no right thereto, and a judgment of ouster excluding him from the office and declaring it vacant is merely a summary and expeditious method of removing him therefrom. *He does not by his misconduct forfeit an office once lawfully acquired. He does not shorten his term because he was never elected. It terminates the term of his intrusion into the office.* * * * A candidate under such circumstances gains no title through such a proceeding even though * * * he secures a certificate of election. When the fact that a candidate has violated the statute becomes established in the manner provided by the statutes, the certificate is manifestly of no effect because there was no election." (Emphasis supplied.)

Under this construction and in the light of appellant's admitted violation of sec. 12.17, Wisconsin statutes, appellant never acquired any title to this office. He is a mere intruder in it. Hence, even if it were to be admitted that this office and any emoluments connected with it in a different situation might constitute a vested property right, they do not constitute such a right under the facts of this case.

b. A public office and any claim to any emoluments attached thereto do not constitute a vested property right which is entitled to protection under the due process guaranty of the federal Constitution.

The general rule is well settled that a public office such as that involved in this case is not such a vested property right as to be entitled to protection under the due process guaranty of the federal Constitution. (42 *Am. Jur., Public Officers, sec.* 9, pages 886-887, 11 *Am. Jur., Constitutional Law*, sec. 334, page 1145, 12 *id.* sec. 650, page 340; *McQuillin, Municipal Corporations*, 2d ed. sec. 436, page 54, and sec. 514, page 235.)

The decisions of this court are in accord with this statement of the law. (*Taylor vs. Beckham* (1900), 178 U.S. 548, 576, 44 L. ed. 1187, 1200, et seq., 20 S. Ct. 890.) In this case this court said:

> "The view that public office is not property has been generally entertained in this country. * * * (here the court cites and quotes from a number of earlier decisions) * * * In Cranshaw vs. United States, 134 U.S. 99, 104, 33 L. ed. 825, 827, 10 Sup. Ct. Rep. 431, 432, Mr. Justice Lamar stated the primary question in the case to be 'whether an officer appointed for a definite time or during good behavior had any vested interest or contract right in his office of which Congress could not deprive him.' And he said, speaking for the court: 'The question is not novel. There seems but little difficulty in deciding that there was no such interest or right.'" (Citing authorities.)

The doctrine of these earlier decisions of the federal supreme court has never been departed from. (*Dodge vs. Board of Education* (1937), 302 U.S. 74, 79, 82 L. ed. 57, 62, 58 Sup. Ct. 98; *Higginbotham vs. Baton Rouge* (1939), 306 U.S. 535, 538-539, 83 L. ed. 968, 971, 59 Sup. Ct. 705; *Snowden vs. Hughes* (1943), 321 U.S. 1, 7, 88 L. ed. 497, 502.) It must therefore be taken as the settled law of the United States that a public office confers no vested right, either of property or contract, which is entitled to protection under these guaranties of the federal Constitution. This applies also to the emoluments of the office.

c. The procedure prescribed by Chapter 12, Wisconsin statutes, pursuant to which this action was instituted and is being conducted, constituted due process of law, as that guaranty is embodied in the Fourteenth Amendment to the federal Constitution.

Without attempting to phrase an accurate and sufficiently inclusive definition of due process of law as used in the Fourteenth Amendment to the federal Constitution, there is general agreement on its essential elements:

> "The essential elements of due process of law are notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause." (12 *Am. Jur., Constitutional Law*, sec. 573, pages 267-268.)

The decisions of this court are in accord with the foregoing statement of the rule. They extend from such early cases as *Dartmouth College vs. Woodward* (1819), 4 Wheat. (U.S.) 518, 4 L. ed. 629, through *Davidson vs. New Orleans* (1878), 96 U.S. 97, 24 L. ed. 616, 619, et seq., to such late cases as *Anderson National Bank vs. Luckett* (1944), 321 U.S. 233, 88 L. ed. 692, 704-705, 64 S. Ct. 599, 151 A.L.R. 824. No useful purpose would be served in this brief by entering upon any extended citation or examination of the decisions.

With these essential elements of due process in mind, we turn to the provisions of Chapter 12, Wisconsin statutes, regulating the procedure in the ouster action. We find that it is commenced like any ordinary action, except that the complaint must be served on the defendant with the summons (sec. 12.23(1), Wisconsin statutes). Thereafter the procedure follows that in an ordinary

action throughout, save that certain statutory periods for taking certain steps therein are shortened, obviously to prevent the entire term of office being consumed in the litigation before final judgment, thus allowing the alleged wrongdoer to keep himself in the office despite the challenge of his right thereto.

Sec. 12.22, Wisconsin statutes, requires a specific showing under oath of probable cause to believe that sec. 12.17, Wisconsin statutes, has been violated before an ouster action can be started. This showing is made *ex parte*, and may, at the election of the elector who makes the showing, be made in the form of an application to the governor, the attorney general or the county judge for leave to commence the suit in the circuit court. This statutory choice of officers before whom the application may be made shows that it is contemplated that they shall act in an administrative rather than a judicial capacity. This preliminary application, designed to prevent manifestly baseless circuit court actions, operates for the benefit of the one charged with violation of sec. 12.17, Wisconsin statutes. He is not, however, entitled to notice or hearing on this preliminary application to one of these officers, acting administratively.

IV.

CONCLUSION

For the reasons stated in this brief, it clearly appears that the appeal herein presents no substantial federal question, either on the challenge of the appellant that the decision appealed from operated to deny his right of free speech or press, or on the challenge that it deprived him of property, without due process of law. On neither of these challenges is a substantial federal question presented. The appellee's motion to dismiss the appeal should therefore be granted.

Respectfully submitted,

WALTER H. BENDER,
Attorney and Special
Counsel for Appellee.

APPENDIX

For the convenience of the Court the full text of the Wisconsin statutes referred to in the foregoing brief is here set forth.

"12.17. *False statements affecting candidates.* No person, firm or corporation shall knowingly make or publish, or cause to be made or published, any false statement in relation to any candidate, which statement is intended or tends to affect any voting at any primary or election." (Vol. I, Wisconsin Statutes, 1953, page 155)

"12.22. *Special proceedings and counsel to prosecute violations.* (1) If any elector of the state shall have within his possession information that any provision of this chapter, has been violated by any candidate for which such elector had the right to vote, or by any personal campaign committee of such candidate, or any member thereof, he may, by verified petition apply to the county judge of the county in which such violation has occurred, to the attorney-general of the state, or to the governor of the state, for leave to bring a special proceeding to investigate and determine whether or not there has been such violation by such candidate or by such committee or member thereof, and for appointment of special counsel to conduct such proceeding in behalf of the state.

"(2) If it shall appear from such petition or otherwise that such candidate, committee or member thereof has violated any provision of this chapter, and that sufficient evidence is obtainable to show that there is probable cause to believe that such proceeding may be successfully maintained, then such judge or attorney-general or governor, as the case may be, shall grant leave to bring such proceeding and shall appoint special counsel to conduct such proceeding.

"(3) If such leave be granted and such counsel appointed such elector may, by a special proceeding brought in the circuit court in the name of the state upon the relation of such elector, investigate, and said court shall determine whether or not such candidate, committee or member thereof, has violated any provision of this chapter; but nothing contained in this chapter shall be considered as limiting in any way the effect, or as preventing the operation, of any other existing remedy." (Vol. I, Wisconsin Statutes, 1953, page 156)

"12.23. *Process; pleadings; trial; evidence; costs.* (1) In such proceeding the complaint shall be served with the summons, and shall set forth the name of the person whose election is contested, and the grounds of the contest in detail, and shall not thereafter be amended except by leave of the court. The summons and complaint in the proceeding shall be filed within five days after service thereof.

"(2) The answer to the complaint shall be served and filed within ten days after the service of the summons and complaint. Any allegation of new matter in the answer shall be deemed controverted by the adverse party without reply, and thereupon said proceeding shall be at issue and stand ready for trial upon five days' notice of trial.

"(3) All such proceedings shall have precedence over any civil cause of a different nature pending in such court, and the same shall be tried and determined the same as civil actions are tried and determined.

"(4) If more than one proceeding is pending or the election of more than one person is investigated and contested, the court may, in its discretion, order the proceedings consolidated and heard together and may equitably apportion costs and disbursements.

"(5) The parties to such proceedings may invoke the provisions of section 325.14 and 326.12, but two

days' notice of the taking of the deposition of any witness shall be sufficient notice thereof.

"(6) In all such proceedings either party shall have the right of change of venue, as provided by law in civil actions, but application for such change must be made within five days after service of summons and complaint, and the order for such change shall be made within three days after the making of such application and the papers transmitted forthwith, and any neglect of the moving party to procure such transmission within such time shall be a waiver of his right to such change of venue.

"(7) If judgment is in favor of the plaintiff the relator may recover his taxable costs and disbursements against the person whose right to the office is contested, but no judgment for costs shall be awarded against the relator, unless it shall appear that such proceeding has been instituted otherwise than in good faith. All costs and disbursements in such cases shall be in the discretion of the court." (Vol. I, Wisconsin Statutes, 1953, page 156)

"12.24. *Judgment or findings; appeal; forfeiture of office.* (1) If the court shall find that the candidate whose right to any office is being investigated, or his personal campaign committee or any member thereof has violated any provision of this chapter, in the conduct of the campaign for nomination or election, and if such candidate is not one mentioned in subsection (2) hereof, judgment shall be entered declaring void the election of such candidate to the office for which he was a candidate, and ousting and excluding him from such office and declaring the office vacant. The vacancy thus created shall be filled in the manner provided by law, but no person found to have violated any provision of this chapter shall be eligible to fill any office or to become a candidate for any office, candidates for which have been voted for at the primary or election in connection with which such violation occurred.

"(2) If such proceeding has been brought to investigate the right of a candidate for member of the state senate or state assembly or for senator or representative in congress, and the court shall find that such candidate or any member of his personal campaign committee has violated any provision of this chapter, in the conduct of the campaign for nomination or election, the court shall draw its findings to such effect and shall forthwith, without final adjudication, certify his findings to the secretary of state, to be by him transmitted to the presiding officer of the legislative body, as a member of which such person is a candidate.

"(3) Appeals may be taken from the determination of the court in such proceeding in the same manner as appeals may be taken as provided by law in civil actions, but the party appealing shall in no case be entitled to or obtain a stay of proceedings. No injunction shall issue in any such proceeding suspending or staying any procedure therein or connected therewith, except upon application to the court or the presiding judge thereof, upon notice to all parties and after hearing.

"(4) No judgment entered as provided for herein shall be any bar to or affect in any way any criminal prosecution of any candidate or other person." (Vol. I, Wisconsin Statutes, 1953, pages 156-157)

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 525

STATE OF WISCONSIN, ex rel.
JAMES R. MATTISON,

Appellee,

vs.

ALFRED J. BAUDHUIN,

Appellant.

BRIEF OPPOSING MOTION TO DISMISS APPEAL

LAWRENCE G. WICKERT and
HAROLD H. FUHRMAN,
8742 North Green Bay Road,
Milwaukee 9, Wisconsin,
Attorneys for Appellant.

HAMMERSMITH-KORTMEYER CO. MILWAUKEE

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IN THE

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No. 525

STATE OF WISCONSIN, ex rel.
JAMES R. MATTISON,

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vs.

ALFRED J. BAUDHUIN,

Appellant.

BRIEF OPPOSING MOTION TO DISMISS APPEAL

QUESTIONS PRESENTED ON THIS APPEAL

In the case at bar a proceeding was commenced against the appellant to have the election of the appellant as Town Chairman of the Town of Granville, Milwaukee County, Wisconsin, declared void and to oust him from said office because he allegedly made false statements relating to his rival in the campaign preceding his election. The statute allegedly prohibiting such statements is Section 12.17, Wisconsin Statutes, and the statutes providing for ouster from office are Sections 12.22-12.24, Wisconsin Statutes. The following questions are presented by this appeal:

(1) Is Section 12.17, Wisconsin Statutes, repugnant to the First and Fourteenth Amendments to the Federal Constitution because it abridges Appellant's Freedom of the Press?

(2) If it is determined that Section 12.17, Wisconsin Statutes, is valid per se, do the decisions of the Wisconsin Supreme Court construing that statute create a standard inhibiting Freedom of the Press which is so vague as to constitute an unconstitutional infringement of that freedom?

(3) Are Sections 12.22-12.24, Wisconsin Statutes, invalid because they fail to provide the accused with Notice and Hearing on the question of whether the conducting of an Ouster Proceeding in Circuit Court should be authorized?

ARGUMENT

I.

Section 12.17, Wisconsin Statutes, is Unconstitutional.

The First Amendment to the United States Constitution provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

While the due-process clause of the Fourteenth Amendment does not incorporate all of the provisions of the first ten amendments to the United States Constitution so as to make the same applicable to state action,[1] the freedoms

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[1] *Adamson v. California* (1947), 332 U.S. 46, 67 Sup. Ct. 1672, 91 L. Ed. 1903, 171 A.L.R. 1223; and see article, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" by Professor Charles Fairman, 2 Standford Law Review (1949), 5.

of the First Amendment are among the liberties of the people protected against state interference or restriction by such due-process clause.[2]

From the beginning of America as an independent Nation our jurisprudence has deviated radically from English statutory and common law in the field of freedom of expression. A review of *The Federalist* and other historical sources covering the initial period of our country's independence will reveal that the Federal Constitution would never have been adopted without the agreement of the proponents of the Constitution to amend the same to include the Bill of Rights. That freedom of expression should be guaranteed by the First Amendment to the Constitution is not accidental. The desire for such liberty had long burned in the hearts of Americans before the Revolution. So strong was this quest for freedom that the jury, in the celebrated *Zenger* case, acquitted the defendant of libel notwithstanding the fact that he was clearly guilty under the then existing English law.

Under the early common law of England even truth was not a defense in defamation actions. From time to time Parliament passed statutes strictly limiting freedom of expression. The court of Star Chamber and various commissions and tribunals equally notorious were set up to throttle the human spirit. Acts were passed licensing the publication of all printed matter. Against this backdrop of thought control, there gradually emerged an age of enlightenment which took firm root in only one coun-

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[2] *Gitlow v. New York* (1925), 268 U.S. 652, 666, 45 Sup. Ct. 625, 69 L. Ed. 1138; *De Jonge v. Oregon* (1937), 299 U.S. 353, 364, 57 Sup. Ct. 255, 81 L. Ed. 278; *Thomas v. Collins* (1945), 323 U.S. 516, 65 Sup. Ct. 315, 89 L. Ed. 430; *Saia v. New York* (1948), 334 U.S. 558, 68 Sup. Ct. 1148, 92 L. Ed. 1574; and *Burstyn v. Wilson* (1952), 343 U.S. 495, 72 Sup. Ct. 777, 96 L. Ed. 1098.

try, America. The apostles of this new age were men such as Voltaire and Jefferson. Believing that society would be more benefited than injured by freedom of expression, Voltaire said, "I despise what you say, but I will defend to the very death your right to say it." Likewise, Jefferson said, "I have sworn on the altar of God that I will oppose all that would enthrall the human spirit." These views became basic norms of our national culture and jurisprudence.

Although freedom of expression in America is not absolute, all doubts are resolved in favor of such freedom. Justice Holmes stated in *Schneck vs. U.S.*, 249 U.S. 47, 52 (1919):

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degrees. When a nation is at war many things that might be said in time of peace are such a hinderance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right."

This decision was followed in *Herndon v. Lowry*, 301 U.S. 242, 255 (1937). The meaning of the Holmes' "clear and present danger doctrine" was spelled out in great detail by Mr. Justice Black in *Bridges v. California*, 314 U.S. 252, 263 (1941), in which he stated in behalf of the court:

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to work the furthermost constitutional boundaries of pro-

> tected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech or of the press'. It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

This decision together with its highly valuable footnotes and documentation gives a clear history of the development of our basic law guaranteeing freedom of expression. It is manifest from the reading of this decision that the American concept of freedom of expression is expanding rather than contracting. The court makes it crystal clear that in this field of jurisprudence the American tradition has veered away from the English tradition. See page 264 of that decision.

This differentiation of American law from English law in the field of freedom of expression is very significant in the case at bar, because Section 12.17, Wisconsin Statutes, is based on an English statute passed during the reign of Queen Victoria.[3] Even though the Revolution has come and gone, English statutory and common law, although more liberal and enlightened than ever before, still remain attached to their ancient tradition of control. The Appellee contends that the "clear and present danger doctrine" of the *Schenck* case is not applicable in situations involving libel. However, such argument is not germane to the case at bar because statements made in the course of a political campaign fall within the category

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[3] 58 & 59 Victoria.

of privilege and thus are not actionable.[4] Thus the case at bar is distinguishable from both of the cases upon which the Appellee relies, namely, *Beauharnais v. Illinois* (1952), 243 U.S. 250, 256, 96 L. Ed. 919, 927, 72 S. Ct. 725, and *Chaplinski v. New Hampshire* (1941), 315 U.S. 568, 572, 86 L. Ed. 1031, 1035, 67 S. Ct. 766. An additional and more important reason why these cases are distinguishable from the case at bar is the fact that the instant case does not involve libel or slander but is a purely statutory action. The Wisconsin Supreme court stated in *State ex rel. Hampel v. Mitten* (1938), 227 Wis. 598, 609, 278 N.W. 431, "Although the decision in the *Putnam Case* supra, refers to the section as prohibitive of libelous statements of fact, it is plainly broader in some respects than the law of defamation, and statements of fact concerning the candidate, false and known to be such, may constitute a violation even though not defamatory provided they are intended to or tend to affects votes, and may be the basis for ouster unless they are demonstrably of a trivial and inconsequential character." Hence, it is quite clear that the challenged statute involved in the case at bar, in its impairment of freedom of the press, goes beyond the law of libel and slander and creates a type of action which is *sui generis.*

Of course, the police power of the state can justify an impairment of freedom of the press if the evil sought

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[4] This very question was discussed in the decision of the Supreme Court of Errors of Connecticut, August 1, 1955. *Charles Parker Company v. Silver City Crystal Company,* —— Conn. ——, 116 A. (2d) 440. Ruling out a libel action, the court held that "speech-making and the broadcasting of speeches in an election campaign are, on general principles, occasions of qualified privilege." A political campaign, the court remarked, "is a time-honored American institution indispensable to our way of life. Courts must be careful not to permit the law of libel and slander to encroach unwarrantably upon the field of free public debate."

to be remedied is serious and substantial. This court's opinion in the *Douds Case*[5] refers to the oft-cited "clear and present danger" test enunciated by Mr. Justice Holmes in *Schenck v. United States* (1919), 249 U.S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470, and follows such reference thereto with this statement (339 U.S. 397):

> "So far as the *Schenck Case* itself is concerned, imminent danger of any substantive evil that congress may prevent justifies the restriction of speech. Since that time this court has decided that however great the likelihood that a substantive evil will result, restrictions on speech and press cannot be sustained unless the evil itself is 'substantial' and 'relatively serious,' Brandeis, J., concurring in *Whitney v. California, supra,* at 374, 377, or sometimes 'extremely serious,' *Bridges v. California,* 314 U.S. 252, 263 (1941). *And it follows therefrom that even harmful conduct cannot justify restrictions upon speech unless substantial interests of society are at stake.* But in suggesting that the substantive evil must be serious and substantial, it was never the intention of this court to lay down an absolutist test measured in terms of danger to the Nation." (Emphasis supplied)

When the opinion in the *Douds Case* is reviewed in its entirety, the gist of the holding thereof may be summarized as follows: Congress may impinge upon the freedoms guaranteed by the First Amendment in order to prevent a substantial evil. No absolute test can be laid down in advance as to when such attempted abridgment by legislation of such freedoms is constitutional and when not. This necessitates that whenever courts are called upon to pass upon the constitutionality of such type of legislation they weigh the substantiality of the evil sought to

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[5] *American Communications Asso. v. Douds* (1950), 339 U.S. 383, 70 Sup. Ct. 674, 94 L. Ed. 925.

be prevented thereby against the harm that will result from the restriction imposed by such legislation upon freedom of speech and assembly. If the evil sought to be prevented is considered to be of sufficient substantiality to warrant the restriction, the legislation will be upheld as constitutional, otherwise not.

So, in the case at bar the question is whether or not the evil sought to be prevented is sufficiently substantial to out-weigh the most substantial liberty which a free nation can possess — the freedom of the press. The text of Section 12.17, Wisconsin Statutes, reads as follows:

> "*False statements affecting candidates.* No person, firm or corporation shall knowingly make or publish, or cause to be made or published, any false statement in relation to any candidate, which statement is intended or tends to affect any voting at any primary or election."

We submit that the questioned statute infringes freedom of expression in exactly that facet of our national life in which such freedom should be most untrammelled, namely, in political contests.

Freedom of expression is the life blood of democracy; it is the means whereby the democratic process functions. If a candidate were inhibited by law from expressing his untrammelled opinions, views, fears, and predictions in opposition to the candidacy of his opponent, the popular election of officials would be either a sham or a personal popularity contest. In either event it would be a needless expense to the public. However, the elective system exists for our policy-making offices for the express and legitimate purpose of allowing the divergent segments of the electorate, through their advocates (the candidates), to present at the forum of public opinion their views, ideas, opinions, grievances, fears, anxieties and

analyses concerning the position taken by the opposition. This is the democratic process. The procedure is not the dignified procedure of the Court room. It is the procedure of the street and the beer hall and the hustings. The language of the campaign is not the language of a trial in a judiciai tribunal. The language is that of the man of the street. The niceties and refinements of judicial decorum are waived in favor of allowing the candidates to speak freely to the people. Of necessity, the candidates cannot be held to the same high order of responsibility for their diction that obtains in a trial, in business negotiations, or in some other areas of human endeavor and conflict.

The reason why statements made by candidates in the course of a political campaign have been considered privileged as against an action for libel or slander is that the public itself has an interest in the individual candidate's freedom of expression. If an individual candidate can be thrust into court and subjected to damages for speaking freely in a political campaign the greatest abuses could then become possible, and opposition to any political element could be effectively stifled. The same reason that gives the political candidate privilege as against an action for defamation should motivate this Court to strike down Section 12.17, Wisconsin Statutes, as being repugnant to the Federal Constitution guaranteeing freedom of expression. If such legislation is given approval, a successful means of silencing political opposition will have been forged.

Little benefit accrues to the limitation of the statute's liability to known misstatements of "fact." In the political realm, how does one distinguish between fact on one hand, and comment, criticism, analysis, prophesy, and prediction of doom on the other hand? To illustrate:

Suppose a candidate for a United States senatorial seat accuses the incumbent senator as follows, "He is ruining the country by supporting Benson's Flexible Farm Price Support Plan." Suppose further that the senator has disclaimed the Benson Flexible Farm Price Support Plan, although he had previously voted for legislation relating to the Department of Agriculture under which the Benson Plan was promulgated. Is the accusation against the incumbent senator comment or is it a statement of fact?

We submit that in the political arena it is impossible to effectively distinguish between fact and comment. Actually, political scientists themselves agree that political science is far from being a pure science because the principles which it embodies cannot be proved with that accuracy and precision which characterizes the pure sciences. Hence, the suggestion of the Appellee that the statute is designed to secure "purity of elections" is unrealistic.

It is unfortunate that the Wisconsin Supreme Court passed upon the constitutionality of the statute involved in an earlier age before contemporary concepts of freedom of expression became crystalized. In summarily disposing of the constitutional issues in the instant case that Court merely stated:[6]

> "The constitutional objections to the statute raised herein have been considered and determined by this court in prior cases, particularly in *State ex. rel. La Follette v. Kohler,* 200 Wis. 518, 228 N.W. 895. A thorough statement of the constitutional objections to ch. 12 and a discussion of the many cases that have determined the objections to be without merit would unduly lengthen this opinion."

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[6] State ex rel. Mattison v. Baudhuin, (1954), 270 Wis. 249, 255.

There is little doubt in our minds that the same Court would have ruled to the contrary had the constitutional issues involved come before it for the first time in the case at bar. Evidence of this can be found in the fact that on the very same day, June 1, 1955, when the decision in the instant case was rendered, the same court rendered its decision in the case of *Lawson v. Housing Authority* (1954), 270 Wis. 269. In that case the Wisconsin Supreme Court declared the Gwinn Amendment[7] unconstitutional on the ground that that legislation did not prevent an evil sufficiently substantial to justify the impingement of the freedoms guaranteed by the First Amendment to the Federal Constitution effected by that statute. The decision was sustained by this Court.

II.

Section 12.17, Wisconsin Statutes, as construed by the Wisconsin Supreme Court, creates a standard inhibiting freedom of the press which is so vague as to constitute an unconstitutional infringement thereof.

In the event this Court should find Section 12.17, Wisconsin Statutes, valid per se, it is clear that the decisions of the Wisconsin Supreme Court establish a standard inhibiting freedom of the press which is so vague as to constitute an unconstitutional abridgment of that freedom. As indicated in the Appellee's Brief, the Wisconsin Supreme Court has construed Section 12.17, Wisconsin Statutes, to apply only to misstatements of fact and not to mere comment. In the preceding section of this Brief, we have indicated the difficulty in distinguishing

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[7] A proviso of the Independent Offices Appropriations Act of 1953. (Public Law No. 455, 82d Cong. 66 State. at L., p. 403, 42 USCA sec. 1411c).

between fact and comment in a political campaign. This is best illustrated by the application of the statute in the case at bar and in a prior decision, *State ex rel. Hampel v. Mitten* (1938), 227 Wis. 598, 278 N.W. 431. In the *Hampel Case* the following language was alleged to be actionable if proved false (p. 599-600):

> "In order to be sure that my words will not be twisted, I will read from manuscript.
>
> "I desire to say here a few words about a love pirate and demoralizer of families. When families, churches and homes will be desecrated, there will prevail in society the same situation, which was described in today's issue of the Wisconsin News. News headlines say that five thousand priests and nuns have been murdered by the reds.
>
> "'The other night, October 21st, my Socialist opponent, speaking over Station WTMJ, declared that he is a model of morality. He can be compared to a thief, who breaks into a home at night. He would have gotten away with the lies had I not been a deputy sheriff in Judge Fritz's court, where a case was tried. My opponent was then sworn and examined. He stammered and squirmed like an eel in a net when he tried to explain the letter given below. I have photostatic copies of this letter written to a married woman.'"

In the same case, the opinion states:

> "It is alleged that defendant then read a letter written on December 19, 1918, by plaintiff, while a soldier at Camp Grant to a woman in Milwaukee County previously married, but who, for some time prior thereto, had been absolutely divorced from her husband. The address is alleged to have closed with an appeal to the voters not to elect a man of this character to such an important office as that of sheriff. Plaintiff further alleged that at a political meeting held in Bay View the speech was repeated, and that

on October 24, 1936, defendant caused the contents of the manuscript from which the defendant read in his address to be printed as a news article in the Nowiny Polski, a Polish language newspaper of daily circulation in the county; that prior to the general election defendant requested representatives of the Milwaukee Journal and Kuryer Polski Daily, newspapers of general circulation, to publish the contents of this address, which said newspapers refused to do; that defendant made no investigation to determine the truth or falsity of the charges; that the statements were wilfully made by defendant, were false, slanderous, and malicious, and known to be such by defendant; that defendant made such statements for the purpose of bringing about his election as sheriff of Milwaukee county and the defeat of plaintiff for this office; that the statements were made for political purposes and were intended to affect the voting for the office of sheriff by the electors of the county, and that they constituted violations of sec. 12.17 of ch. 12, Stats., entitled 'Corrupt Practices Relating to Elections.' It is further alleged, on information and belief, that the unlawful acts of defendant tended to affect the voting of the electors of Milwaukee county in the election for sheriff."

A demurrer was interposed to the complaint in the *Hampel Case* as in the instant case on the ground that the complaint failed to state a cause of action. The trial court sustained that demurrer and the Wisconsin Supreme Court affirmed. The Wisconsin Supreme Court ruled that the statements of the defendant indicated above did not constitute statements of fact and therefore, were not actionable.

In the case at bar, however, the Wisconsin Supreme Court ruled the following language to be an actionable misstatement of fact, if proved false:

"THE REAL REASON FOR MR. SELLS' CANDIDACY. You have noticed in his public statements that Mr.

> Sells has advocated the *consolidation of functions* by the municipalities of Milwaukee County. As you know, this idea is the brainchild of Walter J. Mattison, the City Attorney of the City of Milwaukee. This proposal is designed to be the first phase of a gigantic program for the annexation of the Town of Granville to the City of Milwaukee. It is interesting to note that the attorney for Mr. Sells is James R. Mattison, the son of the City Attorney of the City of Milwaukee. Have you ever heard of a more clever Fifth Column movement within the Town of Granville? In the event Mr. Sells is elected as Town Chairman you can expect the Town of Granville to be surrendered without a fight to the City of Milwaukee (with its known exorbitant tax policy). Walter J. Mattison, as City Attorney for the City of Milwaukee, will likely 'negotiate', with his son, James R. Mattison, the attorney for Mr. Sells, and the Town of Granville will be 'sold down the river'! This interesting alliance has never been brought to the attention of the people of the Town of Granville."

We submit that on the basis of reason it is impossible to distinguish the case at bar from the *Hampel Case*. If there is some subtlty of logic which could distinguish the two cases, it is quite manifest that the standard established by the Wisconsin Supreme Court for distinguishing comment from statements of fact is extremely vague. This vagueness is such as to put any layman participating in a political campaign in a most hazardous position. For that reason alone the Appellant has ample ground to support his position that Section 12.17, Wisconsin Statutes, as interpreted and applied by the Wisconsin Supreme Court, violates the Federal guaranty of freedom of the press.

In the same case and in the prior case of *State ex rel. Pelishek v. Washburn* (1937), 223 Wis. 595, 600, 270

N.W. 541, it is held that only a "substantial" violation of the statute is actionable. The language complained of in the *Hampel Case* as stated above was construed by the Wisconsin Supreme Court not to be a "substantial" violation of the statute.

Here, again, it is submitted that it is impossible on the basis of reason to distinguish the case at bar from the *Hampel Case*. The language complained of in the *Hampel Case* actually is much more extreme in its express wording and in its innuendoes than is the language in the case at bar. How, then, can the use of the language contained in the case at bar be construed to be a substantial violation, if untrue, and the language of the *Hampel Case* construed to be an insubstantial violation of the statute, if untrue? If any standard emerges from the two decisions it is a standard so vague as to be repugnant to the Federal guaranty of freedom of the press. Now, let us examine the language complained of in the case at bar, sentence by sentence.

Heading and First Sentence.

The heading and first sentence of the paragraph complained of read as follows: "The Real Reason For Mr. Sells' Candidacy. You have noticed in his public statements that Mr. Sells has advocated the *consolidation of functions* by the municipalities of Milwaukee County." It should be noted that the Complaint does not allege that this statement is untrue. The only objection made is: "The promotion of a plan for consolidation of functions by municipalities in Milwaukee County was not the 'real reason' or any reason for the aforesaid candidacy of Evan J. Sells." We submit that what is the "real" reason for any candidacy is obviously in the realm of opinion. There is nothing in the language complained of which

constitutes a misstatement of fact. Although the absence of Mr. Sells' letter from the Complaint deprives the Court of its opportunity to determine for itself the extent to which Mr. Sells favored municipal consolidation of functions, it is clear from the reading of the Complaint that there is no denial that Mr. Sells did advocate such a plan.

Second Sentence.

The second sentence of that paragraph states that the municipal consolidation of functions doctrine was originated by Walter J. Mattison, City Attorney of the City of Milwaukee: "As you know, this idea is the brainchild of Walter J. Mattison, the City Attorney of the City of Milwaukee." This statement also is not denied by the Complaint or alleged to be untrue.

Third Sentence.

The third sentence of the paragraph complained of states, "This proposal is designed to be the first phase of a gigantic program for the annexation of the Town of Granville to the City of Milwaukee." The truth of this statement is not denied by the Complaint. The Complaint merely states: "The proposal of such consolidation of municipal functions was not designed by said Evan J. Sells to be the first phase of a gigantic program or any program for the annexation of the Town of Granville to the City of Milwaukee." In response to this statement of the Complaint, it must be noted that no where in the Baudhuin letter does such an accusation appear. The Complaint continues, "Evan J. Sells never participated in any plan of annexation of said township to the City of Milwaukee, but always opposed any such annexation." A careful reading of the paragraph complained of in

the Baudhuin letter will clearly reveal the absence of any accusation relative to such participation by Mr. Sells. It must be kept in mind that the motives of a politician are not necessarily being attacked when one concludes that his doctrines will lead to rack and ruin — to ends just as repugnant to himself as to his critics. For example, one politician might, in criticizing his opponent, state, "John Doe favors farm supports at 100 per cent of parity. This is the first step in the destruction of our national economy." This statement does not mean that the criticized official is being accused of plotting the ruination of the nation's economy; it simply means that, in the opinon of the critic, the pursuance of a certain policy will lead to ultimate economic disaster.

Fourth Sentence.

The fourth sentence states that, "It is interesting to note that the attorney for Mr. Sells is James R. Mattison, the son of the City Attorney of the City of Milwaukee." This sentence also is not denied or alleged to be untrue by the Complaint.

Fifth Sentence.

The fifth sentence asks the question, "Have you ever heard of a more clever Fifth column movement within the Town of Granville?" This question is based upon the preceding sentences of the paragraph complained of. If those sentences do not indicate the existence of a Fifth Column movement, the reader is invited to so conclude.

Sixth Sentence.

The sixth sentence in the paragraph complained of states, "In the event Mr. Sells is elected as Town Chair-

man you can expect the Town of Granville to be surrendered without a fight to the City of Milwaukee (with its known exorbitant tax policy)." This sentence obviously is not a statement of fact but is a prediction of the appellant. Certainly the appellant had the right to make this prediction, this prophecy of doom, and express the same to the electorate.

Seventh Sentence.

The seventh sentence states, "Walter J. Mattison, as City Attorney for the City of Milwaukee, will likely 'negotiate', with his son, James R. Mattison, the attorney for Mr. Sells, and the Town of Granville will be 'sold down the river'!" This sentence clearly is not a statement of fact but a dire prediction which the appellant was certainly privileged to make and to publicize if he saw fit so to do.

Concluding Sentence.

The concluding sentence of the paragraph complained of states, "This interesting alliance has never been brought to the attention of the people of the Town of Granville." There is no allegation in the Complaint that this statement is false. Certainly it cannot be actionable.

In evaluating the paragraph complained of in its entirety and in determining whether or not the appellant was justified in entertaining the fears therein expressed, it should be noted that at the time involved the City of Milwaukee was prosecuting a mammoth annexation movement in the Town of Granville, and that this annexation movement was being militantly defended in the Courts by Walter J. Mattison, the City Attorney of Milwaukee. This is a matter of judicial knowledge as appears from

the case of *In re Village of Brown Deer*, 267 Wis. 481. In that case, the Supreme Court states, "The area of 20½ square miles involved more than double the amount of land ever involved in annexation proceedings by the City of Milwaukee." Obviously, a layman, such as appellant, seeing the son of the City Attorney participating in the campaign of his opponent, Mr. Sells, could hardly escape the fear that this relationship constituted a threat to the territorial integrity of the Town of Granville. It is inconceivable that appellant could be guilty of an actionable misstatement of fact by publicly expressing such fear.

It can be clearly seen by the examination of the language complained of in the instant case that any liability of the defendant predicated upon the statute involved, as construed by the Wisconsin Supreme Court, rests upon a very vague standard indeed. Such a statute is repugnant to freedom of expression guaranteed by the Federal Constitution. See *Herndon v. Lowry*, 301 U.S. 242, 81 L. Ed. 1066.

III.

Section 12.22 - 12.24, Wisconsin Statutes, are invalid because they infringe the Federal guaranty of procedural due-process of law.

Providing a person with notice of any proceeding in which his rights, especially his property rights, are involved and further providing him with the opportunity to be heard in such proceedings are basic essentials of our jurisprudence. These essentials are, in fact, found throughout the woof and warp of our law. Perhaps the most celebrated recent authority on the subject is *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306. Although we do not contend that Chapter 12 of the Wisconsin

Statutes, in its entirety, is unconstitutional, it see: clear that Sections 12.22-12.24, thereof do fail to meet those minimum requirements of notice and hearing which are basic to our Anglo-American legal tradition of fairness. Under Section 12.22 (1) and (2) the authorization for the commencement of an ouster proceeding can be procured by the issuance of an *ex parte* order by the County Judge upon the filing with him of a petition alleging a violation of Chapter 12. In fact, no provision for a hearing on such petition is even authorized by the Statute. This evil certainly is not cured by the fact that the accused can, after the authorization of the ouster proceeding, appear in Circuit Court to defend himself. The authorization of the ouster proceeding alone is a serious blow to the reputation of the accused regardless of the ultimate outcome of the proceeding. Accordingly, the elected candidate should be given a notice of the filing of a petition for an ouster proceeding and he should be given an opportunity to be heard before such a proceeding is authorized by the County Judge. The subsections of the statute, failing to so provide, are invalid in that they fail to provide the elected candidate with procedural due process of law in a proceeding which affects his property rights, to-wit, the emoluments appertaining to his office.

It is suggested by the Appellee that the Appellant is not even entitled to assert the due-process guaranty of the Fourteenth Amendment of the Federal Constitution because the Appellant's demurrer admits that he never came into possession of the office in question. This is untenable because: (1) A demurrer does not admit a conclusion of law[8]; (2) A demurrer does not admit the facts of the com-

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[8] See *State ex rel. Johnson v. Nye* (1912), 148 Wis. 659, which stated, "The demurrer admits only facts well pleaded, not conclusions."

plaint when the constitutionality of a statute is being attacked. This the trial court itself recognizes, stating, "A general demurrer to a complaint challenging the constitutionality of a statute does not admit the allegations of a complaint to be true, *Ritholz v. Johnson,* 245 Wis. 494, 489, for that purpose." (p. 21 of Jurisdictional Statement).

Hence, the suggestion that the Appellant had no property rights which could enjoy the protection of the Fourteenth Amendment because he never acquired office fails because it begs the question in issue.

The Appellee argues that under Federal decisions an office is not property and therefore, is not entitled to the protection of the Fourteenth Amendment, decisions of the State Supreme Court to the contrary notwithstanding. To this effect the respondent cites the case of *Taylor v. Beckham* (1900), 178 U.S. 548, 144 L. Ed. 1187, 1200, *et seq.,* 20 Sup. Ct. 890. That case arose in Kentucky and involved the offices of Governor and Lieutenant Governor in that state. The Court correctly held that under Kentucky law a public office is not property. The Court also correctly stated that in most states a public office is not considered property. However, property rights are defined and determined by the local law of the state in which the case arises, unless the case involves the Federal Government. It is very clear from the case of *Erie Ry. Co. v. Tompkins,* 304 U.S. 64 (1938) that there is no federal common law as such. Hence, in the majority of states, where a public office is not property, the deprivation of such office is not subject to the limitations of the Fourteenth Amendment. However, in Wisconsin, where a public office is considered property within the meaning of the due process clause, the deprivation of office is subject to the limitations of the Fourteenth Amendment. See *Ekern v. McGovern* (1913), 154 Wis.

147, 252, *et seq.*, 142 N.W. 595, 46 L.R.A. (N.S.) 796, *State ex rel. Rodd v. Verage* (1922), 177 Wis. 295, 299, 187 N.W. 830, 23 A.L.R. 491, and *Finneran v. Burlington*, 189 Vt. 1, 93 A. 254.

Whether or not a given procedure meets the requirements of the Fourteenth Amendment as to due process depends upon the circumstances of a given situation. Each case stands upon its own two feet. However, in general, there is an absolute necessity for timely notice and hearing at each stage of a proceeding involving property rights.

It is suggested by the Appellee that *ex parte* procedure established by Section 12.22, Wisconsin Statutes, is not judicial in nature but administrative (See p. 21 of Appellee's Brief). This, we submit, does not change the efficacy of the due process clause. Indeed, the trend today is in the direction of subjecting all administrative agencies to a stricter compliance with constitutional guaranties. See Jefferson B. Fordham and Theodore H. Hustad, Jr., "John Marshall and the Rule of Law", 105 U. of Penn. Law Review, No. 1, October, 1955, p. 61, 67: "Mr. Justice Frankfurter has said: 'The history of liberty has largely been the history of observances of procedural safeguards. John Marshall's conduct in the proceedings arising out of the Burr conspiracy indicates his concurrence with this proposition. The atmosphere of political tension in which those proceedings took place was calculated to put fair procedure and judicial impartiality to the test. That they stood the strain is a lesson for our time.'" The same law review article makes reference to recent district court cases which have arisen in the District of Columbia in which it has been held that an applicant for a passport cannot be denied the same by the Department of State unless he is given an oppor-

tunity to be heard upon the alleged reasons why a passport should be denied him. *Dulles v. Nathan,* No. 12727, D.C. Cir., June 23, 1955: "It is ordered by the Court that the said order of the District Court entered June 1, 1955, be, and it hereby is, stayed until further order of this Court, provided, however, (1) That the Department of State accord a *quasi* judicial hearing on the Appellee's application for a passport, with opportunity provided to the Government and to the Appellee to offer evidence, such hearing to be commenced on or before Tuesday, June 7, and to be concluded within three (3) days unless this Court upon application extends the time." A similar case is *Foreman v. Dulles,* Civil No. 4924-54, D.D.C., June 28, 1955. In this case, according to the article cited: "The District Court found that the applicant had been granted 'informal hearing' which consists exclusively of an interrogation of the applicant without production of evidence or witnesses against him, no stenographic record being made although requested by the applicant, and without disclosure to him of the record or report on the basis of which his application was disapproved. The Court concluded that the 'denial to the plaintiff of a passport without appropriate hearing was a denial of due process of law. * * *' The Court accordingly ordered the secretary to accord the plaintiff a *quasi* judicial hearing."

In the case at bar the procedure used did not afford him either notice or hearing on a question of whether an ouster proceeding should be authorized. Manifestly, his constitutional rights to procedural due process have been violated.

CONCLUSION

It is quite clear that the issues raised in this appeal are substantial Federal questions. They affect the liberty and the property of a United States citizen. They affect freedom of the press and the free exercise of political and civil rights. They affect the validity of statutory provisions which have not been tested in this Court heretofore. Therefore, an order should be entered noting probable jurisdiction and requiring a hearing on the merits of the case before the Supreme Court of the United States.

Respectfully submitted,

LAWRENCE G. WICKERT and
HAROLD H. FUHRMAN,
Attorneys for Appellant,
Alfred J. Baudhuin.